

265. Ironically, this changed paper requirement was added at a time when KFUD was maintaining that the change had gone in the opposite direction, away from a classical background as a requirement and toward sales skills as a prerequisite. KFUD Ex. 4, p. 9 (Testimony of Dennis Stortz).

266. KFUD did not even consider the Sales Manager's position to require classical background until license renewal time was approaching. Compare NAACP Ex. 40, pp. 17-18 (June, 1987) (saying nothing about classical background or training as a position qualification) with NAACP Ex. 41, p. 15 (June, 1989) (an "other desirable" position qualification is "knowledge of the classical music format.")

267. Indeed, although it relied on statistics showing African American listenership to KFUD for the proposition that such listenership reflected African Americans' job qualifications, KFUD did not offer any evidence that it asked White applicants for sales position whether he or she listened to KFUD-FM.

268. It is especially significant that before license renewal time was approaching, KFUD internal documents did not reflect a classical music requirement for salespeople -- since the same set of documents did reflect that requirement even for the Chief Engineer. NAACP Ex. 40, pp. 16 (June, 1987) (an "other desirable" qualification is "knowledge of and appreciation for classical music.")

269. The notion that classical music background can legitimately be a prerequisite to a job selling radio airtime, as opposed to a secondary competency one can (but need not necessarily) learn on the job, is difficult to defend logically. According to Hutchinson:

I understand that KFUD-FM has argued that "classical music expertise" (whatever that is) is an appropriate prerequisite to be hired to sell airtime on a classical music station. I am aware that KFUD-FM changed from a noncommercial to a commercial operation in 1982, and that the station maintains that unlike salespeople at an established commercial classical station, KFUD-FM salespersons needed classical music expertise because they had to establish KFUD-FM's "product" to advertisers for the first time.

That is preposterous and no broadcaster with any sense would believe it. A radio station is not a record store. The "product" being sold is not classical music; the product is the availability of listeners, in particular numbers and with particular demographics, at particular times of day.

Every businessperson interested in buying radio airtime is very familiar with what classical music is. Unlike "new age" or "acid rock", "classical" is not an obscure or esoteric format advertisers wouldn't know anything about. KFUD-FM was hardly a startup station introducing new music into a market which had never heard this music before.

For a few weeks in 1982, when KFUD-FM's "commercial classical" format was being rolled out, a salesperson might have needed to explain to advertisers how KFUD-FM operated differently as a commercial station than as a noncommercial station. However, those differences involve announcing style, scheduling, and pacing -- matters easily explainable by a salesperson with radio sales expertise without regard to his or her "classical music expertise."

KFUD-FM had the commercial classical format all to itself. It did not need to differentiate itself from any other commercial classical station. It did, however, need to convince advertisers that its listeners had attractive demographics and were tuning in to hear the programming, whatever that programming might happen to be.

Radio salespeople need to know radio sales. Someone who is good at selling airtime on a Black or country/western radio station is far more qualified to sell for a classical station than a classical musician who can't interpret an Arbitron report. A good automobile salesperson who doesn't know Brahms from Beethoven will do far better in classical radio airtime sales than a Symphony season ticket holder who's never set foot in a radio station.

An advertiser on classical radio might occasionally have a special need, such as being scheduled for spots during a symphony rather than during an opera. Thus, it might be important for a classical music salesperson to know the difference between a symphony and an opera. But any good radio salesperson could learn, in a couple of hours or less, everything he or she would need to know about classical music in order to service almost every advertiser's special needs.

NAACP Ex. 8, pp. 1-3.

270. Richard Miller is a retired St. Louis broadcaster. Beginning in 1969, he operated five commercial stations, including KRJY-FM in St. Louis, an oldies-format station. He has hired or supervised dozens of salespeople and announcers over the years, until recently. NAACP Ex. 13, Tr. 437. The parties stipulated that if Richard Miller had testified he would have said the following.

Advertisers buy demographics: for example, age, race, gender and income. Buyers of airtime want media research data, and are generally not concerned with the minutiae of the music, such as which cellist is playing in which orchestra.

That is why specialized knowledge of the details of the format is not essential for a radio salesperson. He or she cannot hate the music, of course, and can't be stupid. He or she must know, for example, that classical music attracts people with a college education, high income, and people who travel a lot, eat out a lot, and are frequent fliers. In selling for a station with a format such as classical, the task is to persuade the advertiser that the station reaches an upscale market.

Some rudimentary familiarity with the music is helpful. For example, an advertiser might ask how long a symphony is, because he or she might want to know whether it will be interrupted by advertisements. But these things can be learned easily and quickly, and they can be learned on the job. For example, a salesperson who doesn't know very much about classical music, but is a good salesperson, might be asked to take a course on classical music appreciation at a junior college as part of his or her growth process in the job.

NAACP Ex. 12, p. 1.

271. Furthermore, even if classical music background were erroneously deemed a prerequisite for sales positions, African Americans with that background are not difficult to find.

Hutchinson stated that

I understand that KFUD-FM has also argued that qualified Blacks with classical music expertise are hard to find. That argument might have some merit in Springfield or Peoria, but certainly not in St. Louis. St. Louis has an enormous pool of qualified Black radio professionals who can do any job in any radio station and do it very well.

NAACP Ex. 8, p. 3.

272. Richard Miller agreed and would have testified:

If a broadcaster really wants to hire minorities, he or she will find a way to do it. These days, every major broadcast company has managed to comply with the EEO Rule and doesn't rely on excuses. For example, Blacks work in country/western stations everywhere. It doesn't matter that they might not be able to go home and talk to their friends about Conway Twitty and Dolly Parton. It's a job, and you can make money doing it.

To get Blacks to be radio salespersons, one need simply go to the ad agencies and ask the time buyers "of all the rookie salespeople who call on you, who has good potential, and might be persuaded to leave his or her job?" Or get to know Blacks who work in other media, such as newspapers, where the skills transfer easily to radio. It might not be difficult to get a good Black account executive from a daily or weekly newspaper to cross over to radio.

NAACP Ex. 12, p. 2.

273. Thus, a different theory had to be developed at trial.^{46/} Stortz was the vehicle for that theory. To attempt to fix the patent conflict between its own predesignation pleadings and the facts revealed in discovery, Stortz' written testimony maintained that between 1986 and 1989,

the turnover in the sales force was great and economic pressures forced us to hire replacements quickly. Thus, there were instances in which we had to settle for people who had less knowledge about the 'product' than we might ideally have liked.

KFUO Ex. 4, p. 10.

274. This explanation is so unspecific as to be meaningless. The terms "great" turnover and "economic pressures" could mean anything and could apply to any radio station. KFUE did not point to a single specific instance in which it was unable to find a salesperson with classical music training and thus had to "settle" for someone without such training. Indeed, Hutchinson's declaration, which was quite specific, shows that in practice, the classical requirement was not observed at all. NAACP Ex. 7.

^{46/} On crossexamination, Devantier conceded that a "working knowledge of classical music" could be learned on the job. Tr. 819-20.

275. Furthermore, Stortz well knew that KFUD hardly had to "settle" for anyone. KFUD's February 23, 1990 Opposition, which Stortz preapproved, contained the opposite argument:

[T]he specialized nature of KFUD's program formats have resulted in the stations' receiving a large number of qualified "write-in" applicants each year. The reason is clear -- because there are relatively few classical music or Lutheran religious stations in the country, those persons with a particular expertise in classical music, or a Lutheran theological background, actively solicit positions at stations such as KFUD. When a given job vacancy occurs, KFUD typically has available to it some 20 resumes on file for persons with the specific qualifications KFUD seeks. 7/

7/ Indeed, a number of KFUD's employees originally came to the stations as dedicated volunteers with a special interest in theology or classical music.

KFUD Ex. 4, Tab 7, pp. 16-17.

276. Moreover, KFUD's May 12, 1992 Letter stated that "the religious and classical music formats of our stations attract numerous unsolicited applications from prospective employees around the country with a particular interest/expertise in these areas." MMB Ex. 6, p. 3.

277. In its September 21, 1992 Motion to Strike, KFUD continued to maintain that "[b]ecause there are relatively few classical music and Lutheran religious stations, KFUD receives many unsolicited resumes from qualified applicants around the country with special expertise in classical music or Lutheran theology." MMB Ex. 11, p. 13.

278. KFUD officials knew that its own salespeople lacked classical music training. Its pleadings were thus grounded in a deliberate misrepresentation of fact unknown to the Commission when it issued the HDO. These pleadings were motivated and intended to convince the Commission that this purported job requirement could relieve KFUD from accountability for never having recruited, received an application from, or interviewed -- much less hired -- an African American salesperson.

3. Other Misrepresentations in Sworn Testimony

279. In addition to the misrepresentations contained in direct or oral testimony in connection with the Concordia arrangement (§249 supra) and the nonexistent classical training requirement for salespeople (see §§250-278 supra), at least eleven disturbing misrepresentations, serious distortions and material omissions found their way into KFUD's witness' direct testimony and KFUD witness' testimony on crossexamination.

280. Misrepresentation #61. As noted above, the 1989 renewal applications and the December 29, 1989 Supplement characterized Lauher's July 18, 1989 form letters as a "sample." KFUD Ex. 4, Tab 16, p. 7; MMB Ex. 2, p. 3. Stortz' direct testimony suggests that it was alright to use that word because ten letters were sent, and one would be a "sample" of those ten. KFUD Ex. 4, pp. 17-18. He was oblivious to the underlying omitted fact -- this was a one-shot effort, and the word "sample" implies otherwise.

281. Misrepresentation #62. Associated with these "sample" letters was a data form prepared by Lauher in July, 1989. The form "provides information concerning the sex and race of the applicant, and disposition of the application." MMB Ex. 2, p. 6; the form itself is at MMB Ex. 2, pp. 11-14. In his written testimony, Stortz blamed KFUCO's failure to use the form after Lauher created it on "turnover in managerial personnel." KFUCO Ex. 4, p. 15. That was misleading because the responsibility shifted from Lauher to Stortz himself and Devantier. Stortz and Devantier simply never bothered to follow through or apportion EEO responsibility between one another. Tr. 618.

282. Misrepresentation #63. Stortz asserted that that "certain secretaries" needed to be "familiar with the Lutheran Church" because part of their job was to contact pastors to enlist volunteers for 'Share-A-Thon' fundraisers. KFUCO Ex. 4, p. 7. On cross-examination, Stortz first said that "it's very unusual for Lutherans that...support the radio station to want to talk to and give money to people they feel uncomfortable with, non-Lutherans." Tr. 500. But he was compelled to admit that a caller wishing to give money would not necessarily know if the person answering the phone were a Lutheran." Id. See ¶72 supra.

283. Misrepresentation #64. Stortz maintained that "Church membership was considered desirable for any receptionist" because "the receptionists needed to interface with religious listeners and potential donors." KFUO Ex. 4, p. 8; see also Tr. 495-96; 734. On crossexamination, he could not point to any item religious information a receptionist would need to know except the Church calendar. Tr. 735-36. He also admitted that a person not familiar with the Lutheran Church could be trained to perform the Stations' secretarial or receptionist duties. Tr. 499-500. See ¶173-74 supra.

284. Misrepresentation #65. Stortz testified that familiarity with or membership in the Church would be "desirable" even for engineers. Tr. 501. However, he could not identify any non-engineering related tasks performed by engineers. Id.; Tr. 743. See ¶176 supra.

285. Misrepresentation #66. Stortz' written testimony asserted that "there was high turnover in the General Manager positions, which hindered our effort to establish a consistent outreach effort during the license term." KFUO Ex. 4, p. 11 (emphasis in original). He was referring to the departure of Lauher as General Manager. Tr. 615. Yet this "turnover" shifted EEO responsibility to Dennis Stortz and Paul Devantier. Tr. 618. It was a material omission for Stortz to fail to disclose this fact in his direct testimony.

286. Misrepresentation #67. According to Stortz, the Stations "did little or no employment advertising during the first several yers of the License Term" because the stations "struggled financially throughout the license term." KFUE Ex. 8, p. 6. As shown at ¶¶159-166 supra, the stations did not "struggle financially" and certainly (as Stortz admitted on crossexamination) could have afforded postage stamps to send job notices to its sources. Tr. 486-87.

287. Misrepresentation #68. Stortz direct testimony also attributed KFUE's lack of EEO recruitment to "fewer hirings" in the first several years of the license term. Tr. 485; see Tr. 486, 782. Stortz defined the point at which "more recruitment" commenced as "1986 forward." Tr. 783. However, as shown in Table 5, supra, p. 60, the number of hires was fairly steady since 1985, and it was never inconsequential.

288. Misrepresentation #69. As one of two reasons Stortz gave for placing ads in African American newspapers in the last month of the license term was that "[w]e began to recruit more vigorously." Tr. 544. However, as shown in Table 5, p. 60, KFUE had not begun "to recruit more vigorously." See ¶¶136-138 supra. It would have been embarrassing, perhaps, to be left with only the other (and the genuine) reason for placing these ads: the Petition to Deny had been filed. Tr. 544.

289. Misrepresentation #70. Stortz maintained that KFUD-FM had "made a concerted effort to hire a minority salesperson and did in fact hire Caridad Perez, a Hispanic female, in March 1988." KFUD Ex. 4, p. 12. There was no such "concerted effort." For the position filled by Perez, no recruitment source was contacted; Perez' resume was on file. KFUD Ex. 4, Tab 6, p. 5. Nor was any meaningful recruitment conducted for any other sales position. KFUD Ex. 4, Tab 6. See also KFUD Ex. 6, p. 1 (Testimony of Thomas Lauher, to much the same effect, but stopping short of saying that there was any "effort" to attract Perez or any other minority). See ¶¶132-133 supra.

290. Misrepresentation #71. Lauher testified that the words he meant to include in his written testimony were "we...wanted to hire minorities" rather than "we...wanted to hire a minority." Tr. 103-06. Having gone through several drafts and having two lawyers assisting him, it was preposterous of him to suggest that the words he signed were not the words he intended to be bound to at the time he signed his testimony.